Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 377, 152

JOSEPH S. FAY and JAMES BOVE,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

REPLY BRIEF FOR PETITIONER JOSEPH S. FAY

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I

Due Process.

A

Petitioner asserts that the principle that a jury must be "a body truly representative of the community" is a constitutional principle, one of the fundamental principles of liberty and justice which lies at the base of our civil and political institutions. Respondent denies this and claims that the principle has validity and can be applied only where this Court can exercise its power of supervision over the administration of justice in the Federal courts. Respondent claims that as far as due process of law is concerned, a state, or officials acting under its authority, may, with impunity, and without constitutional restraint, systematically, intentionally, and arbitrarily exclude from jury duty such classes and groups of people as they see fit.

It is significant, and against respondent's position, that the principle that the jury must be "a body truly representative of the community" was first stated, not in a case involving this Court's power to supervise the administration of justice in the Federal courts, but in a case involving the constitutionality, under the Fourteenth Amendment to the Federal Constitution, of a jury empanelled by the State of Texas (*Smith* v. *Texas,* 311 U. S. 128). Furthermore, in the next case in which the Court reiterated the principle (*Glasser* v. *United States,* 315 U. S. 60), the question had been raised under the Fifth and Sixth Amendments to the Federal Constitution.

But conclusive is the fact that the Court has now many times identified the necessity of the jury being "a body truly representative of the community" with "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions", that is, with the substance of due process of law. "Our civil and political institutions" are democratic institutions. In *Smith* v. *Texas,* 311 U. S. 128, 130, the Court stated that a jury not truly representative of the community "is at war with our basic concepts of a democratic society and a representative government." In *Glasser* v. *United States,* 315 U. S. 60, 86, the Court stated that the proper functioning of "our democracy itself, requires that the jury be a 'body truly representative of the community' ". In *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, 220, the Court stated that "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community", and that to disregard the fact that jury competence is an individual rather than a group or class matter "is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury".

It is inconceivable that there could be a more forceful and direct identification of the principle that the jury be

a body truly representative of the community with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions.

Respondent argues (brief, p. 21) that petitioner can make no claim of denial of due process because he cannot show actual bias on the part of the jury which tried him. The argument is without substance. While petitioner does not for a moment concede that he was tried by an impartial jury, or that a jury chosen from a panel composed primarily of bankers, manufacturers, stock brokers and the like, and a few "civic conscious" women, could possibly be impartial to him, it is nevertheless clear that there is no burden on petitioner to show the existence of "actual bias" on the part of the jury which tried him. Petitioner was entitled to "an impartial jury *drawn from a cross-section of the community*". *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220). (Italics supplied.)

In the many cases (see petitioner's main brief, p. 17) in which this Court has reversed convictions of Negroes tried by juries from which Negroes were excluded it has never been held essential to prove, nor has there been proof, that the jurors who tried and convicted the petitioning defendants had any "actual bias". There is no reason whatever for a different rule where the right to a jury truly representative of the community is claimed under the due process clause. Indeed, this Court has many times held that actual prejudice is immaterial where a matter of procedural due process is concerned (see petitioner's main brief, p. 40).

Likewise in every other case where the right to a jury truly representative of the community has been raised and sustained by this Court (*Glasser* v. *United States*, 315 U. S. 60; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217; *Ballard* v. *United States*, 67 S. Ct. 261; *Zap* v. *United States*, October Term, 1945, No. 489, decided March 3, 1947), the Court has never considered it material whether or not the jurors who tried the defendant were "actually biased". To the contrary, in *Ballard* v. *United States*, *supra*, the Court

stated, at page 265: "But reversible error does not depend on a showing of prejudice in an individual case", and in *Thiel* v. *Southern Pacific Co., supra,* the Court, in reversing the judgment on the ground of the exclusion from the jury of laborers working for a daily wage, stated at page 225: "It is likewise immaterial that the jury which actually decided the factual issue in the case was found to contain at least five members of the laboring class".

The cases cited by respondent (brief, p. 21) in support of the proposition that petitioner's claim under the due process clause is dependent on a showing of actual bias on the part of the jury which tried him are readily distinguishable.

In one of these cases, *Buchalter* v. *New York,* 319 U. S. 427, the petitioner's claim under the Federal Constitution was that some of the jurors which tried him were actually biased and that in consequence he was not tried by an impartial jury, in contravention of the due process clause of the Fourteenth Amendment. This Court, in rejecting the claim, stated (p. 430): "We have examined the record and are unable, as the court below was, to conclude that a convincing showing of actual bias on the part of the jury which tried the defendants is established." In other words, all that the Court decided was that the petitioner had failed to prove the fact which he asserted raised the constitutional question, namely, actual bias on the part of the jury which tried him.[1] The same is true of the other case

[1] Respondent cites the *Buchalter* case (brief, p. 3) as authority for the statement that Section 749-aa of the *Judiciary Law* of the State of New York "has been said to present 'no due process question requiring review by this court.'" The Court did state at page 430 of the *Buchalter* case: "Though the statute governing the selection of the jurors and the court's rulings on challenges are asserted to have worked injustice in the impanelling of a jury, such assertion raises no due process question requiring review by this court." It is important then to see just what injustice Buchalter claimed Section 749-aa to have worked. It was this: Subdivision 7 of that statute (see petitioner's main brief, Appendix A, p. 5) provides that the trial court's rulings on any challenge of a special juror for actual bias shall be final. Buchalter did not object to his trial before a special jury and it was contended against him that he thereby waived his right to object to the provisions of subdivision 7. Buchalter, on

cited by respondent, *Spies* v. *Illinois*, 123 U. S. 131. Nor do *Brown* v. *New Jersey*, 175 U. S. 172, and *United States* v. *Wood*, 299 U. S. 123, cited in respondent's brief at page 21, support respondent's position. In the *Brown* case, decided in 1889, the petitioner apparently argued that a particular New Jersey statute authorizing the empanelling of struck juries was unconstitutional on its face. The Court found that the manner of selection of jurors provided by the particular statute seemed, on its face, one calculated to secure an impartial jury and sustained the statute. In *United States* v. *Wood*, the question was the constitutionality, under the Sixth Amendment, of an act of Congress making Federal employees eligible for jury duty in criminal cases. The Court sustained the constitutionality of the Act, holding that an absolute disqualification of governmental employees to serve as jurors in criminal cases was not essential to the impartiality of the jury guaranteed by the Sixth Amendment.

B

There can be no dispute that there are no standards set forth in Section 749-aa of the *Judiciary Law* of the State of New York to govern the officials of the Division of Jurors in the selection of special jurors. While respondent refers (brief, p. 4) to some of the statutory disqualifications for special jury duty as "standards", these disqualifications also apply to general jurors (see *infra*, pp. 12-15). The head of the Division of Jurors was frank to admit that

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the other hand, claimed that he could not waive his right to be tried by a jury free of actual bias. However, both this Court and the Court of Appeals, as indicated above, went directly to the merits of Buchalter's claim and found no evidence of actual bias on the part of Buchalter's jury. Accordingly, subdivision 7 of Section 749-aa of the *Judiciary Law* was found to have worked no injustice requiring review by this Court. None of the questions raised by the present petitioner were, or could be, raised by the petitioners in the *Buchalter* case.

there were no rules governing him and his subordinates in the selecting of special jurors (R. 41, 52).

Thus we find that respondent argues (brief, pp. 4-5) that the matter of standards is mere trivia, that "no constitutional question would have been presented even if the statute had failed to set up any standards, but had left the matter of jury selection entirely to the discretion of the deputy county clerks." Of course there is no support in the cases cited by respondent (brief, p. 5) for this negation of the rule of government by and under law. In *Murray* v. *Louisiana*, 163 U. S. 101, the complaint was that "judicial powers" were conferred on the jury commissioners, and evidently the point was argued only under the equal protection clause of the Fourteenth Amendment, for the Court answered the petitioner's complaint as follows (163 U. S. 108): "It is not pretended that the accused was subjected to any other or different treatment, in respect to that feature of the statute, than that which prevails in other cases, or in the trial of white citizens." In any event, it is not a "judicial power" in the Division of Jurors of which the present petitioner complains: it is an arbitrary power not controlled by any rule, judicial, legislative, or otherwise. In *Franklin* v. *South Carolina*, 218 U. S. 161, the Court found the standards governing the jury commissioners adequate.

In *Akins* v. *Texas*, 325 U. S. 398, it appeared that while the Texas Criminal Code set forth very meticulous standards under which grand jurors must qualify, the names of jurors to serve on a particular grand jury were not drawn by lot from the list of qualified grand jurors, but were selected by the jury commissioners from that list. The Court of its own motion remarked (p. 403) that "This method of selection leaves a wide range of choice to the commissioners," but dropped the question with the note that petitioners did not complain of the practice. *Williams* v. *Mississippi*, 170 U. S. 213, another case cited by respondent in support of the proposition that standards for administrative action are superfluous, has no bearing on the problem.

Apart from the question of whether there is anything in Section 749-aa of the *Judiciary Law* to govern the discretion of the officials of the Division of Jurors in selecting special jurors, the indisputable fact is that these officials did act arbitrarily and capriciously in selecting the panel of special jurors from which petitioner's jury was drawn. They arbitrarily and unreasonably excluded from special jury duty the 90% of those summoned for jury duty who followed the mandatory direction to name preferred months of service;[2] they arbitrarily and unreasonably excluded all laborers, operatives, service employees, and virtually all craftsmen and foremen; they arbitrarily and unreasonably excluded women, particularly those not members of so-called "civic conscious" organizations.

II

Equal Protection.

A

Respondent's explanation of the complete exclusion of laborers, service employees, and operatives from the panel from which petitioner's special jury was drawn, is that the officials of the Division of Jurors "excused" these people on the ground that jury service would be burdensome for persons of their occupation because of undue financial hardship (respondent's brief, pp. 16-17). Suffice it to say that the officials of the Division of Jurors made no such claim.

In any event, the wholesale exclusion of laborers, operatives, and service employees because of their wage scale

[2] By naming two preferred months of service in response to a direction to do so, the prospective juror does not, of course, indicate that he cannot serve in other months. Nor is there anything in the law which requires the Division of Jurors to give effect to the juror's choice of months. Respondent's claim (brief, p. 12) that it is impossible to predict during what season, or for how long, the special juror's services will be required, applies, for whatever it is worth, to general jurors as well.

would be discrimination against persons engaged in these occupations as such, and would not be justifiable without intention and effort to determine in advance whether the individual members of these occupations would suffer undue hardship in serving on the jury. (See *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 224.)

B

Contrary to respondent's assertion (brief, pp. 7-8), petitioner does not contend that the special jury panel was brought into being to meet the exigencies of the present prosecution or for the purpose of prosecuting labor leaders and others similarly situated. Such a contention is no more necessary to petitioner's case than it was necessary for the petitioner in *Smith* v. *Texas*, 311 U. S. 128, to show that the jury panels from which Negroes were excluded were drawn solely for the trial of Negroes.

The District Attorney of New York County states that his office, "which should have been in a position to make accurate judgment of the matter," has been responsible for the trial of several wealthy defendants before special juries and concludes therefrom that the special jury panel is not subject to criticism (respondent's brief, pp. 8-9). But what the District Attorney's office knows is not solely that special juries are prone to convict laboring people and their representatives. What the District Attorney's office knows is that special juries are prone to convict. It has the official reports of the Judicial Council of the State of New York showing that special juries are much more prone to convict defendants in criminal cases than are ordinary juries (see petitioner's main brief, Appendix D, pp. 42-45). That it has acted on the judgment thus formed is evident from the fact that the Judicial Council reported in 1942 that every application for a special jury in the period

July 1, 1932 to June 30, 1941, was made by the prosecution (see petitioner's main brief, Appendix D, p. 49).[3]

It is not a part of petitioner's position to contend that special juries will not convict a propertied defendant any more than it was necessary for petitioner in *Smith* v. *Texas*, 311 U. S. 128, to contend that juries from which Negroes were excluded would never convict white defendants. What petitioner does contend on this phase of the case is that he went to trial with three strikes against him in being forced to be judged by a jury drawn from a panel composed of persons whose interests and habits of thought are hostile to labor and its representatives, and who, from training or otherwise, have acquired a bias in favor of the prosecution.

C

It is significant to compare respondent's statement that it was a matter of indifference to the prosecution whether or not petitioner's jury was partially or predominantly made up of laboring men (brief, p. 25) with the fact that at the trial, the District Attorney peremptorily challenged, with two readily understandable exceptions, every one of the talesmen whom respondent lists in the footnote to its

[3] As indicated by the official statistics issued by the County Clerk of New York County (see petitioner's main brief, footnote, p. 8), there is but little change in the personnel of the special jury panel from year to year. In this case, talesman Harry H. Coon, central office manager for Holmes Electric Protective Company, testified that he had served on the special jury for 20 years (R. 156, 158); Alexander C. Patterson, Jr., contractor, testified that he had served as a special juror "probably fifty times" (R. 131, 137); Alonzo Walling, insurance underwriter until his retirement, testified that he had been on the panel for 10 or 12 years (R. 258, 260); Guy R. Jenkins, insurance broker, testified that he had been on the panel "for a long time" (R. 235, 236), and Mancius H. Hutton, a laboratory engineer prior to his retirement, testified that he had been on the panel "for quite a number of years" (R. 244-246).

brief on page 19 as having been former or present union members.[4] The first exception was Harvey W. Frank. Mr. Frank, a Civil Engineer, and a graduate of New York University, had been for one of the early 17 years for which he had worked for the New York Telephone Company, a member of some company-sponsored organization concerning which he testified "I don't know whether you would call this a labor union or not" (R. 94, 97-98, 101). More significantly, Mr. Frank admitted that he had certain opinions concerning labor unions and labor union officers (R. 99). While the Trial Court sustained objections by the District Attorney to questions seeking to elicit the precise character of these opinions, it was evident from the answers which were given, that such "prejudice" (R. 99) as the talesman had were favorable to the prosecution. The other exception is Junius H. Smith, the gentleman referred to in petitioner's main brief (pp. 14-15), who, at the age of 69, had retired from the Treasury Department of Union Carbide and Carbon Corporation and had gone to work with Brooks Brothers where he joined a union the name of which he did not know and which he joined because Brooks Brothers had told him that "everybody had to belong to the union" (R. 353-354).

In other words, it was perhaps but a salve to conscience for the District Attorney to tell the jury, once the jury had been finally selected how "the twelve truest friends that labor ever had" would have decided the case (see respondent's brief, p. 25).

D

Respondent states (brief, p. 12) that it would only give rise to "useless irritation" to compel "unwilling women" to

[4] None of these persons were, at the time of the trial, laborers, operatives, service employees, or craftsmen (R. 94, 113, 149, 224, 263, 309, 353-354), and respondent's statement (brief, p. 18) that they represent "the type of worker under discussion" accordingly finds no support in the record. Against these persons the prosecution exercised five of its seventeen peremptory challenges (R. 123, 155, 227, 265, 312).

present themselves for examination for jury duty. But the difficulty is that here there was no effort, no intention, to determine in advance whether individual members of the female sex were "unwilling" to serve as jurors. As was the case with the daily wage earning class in *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 224, "All were systematically and automatically excluded."

If it be an "irritation" to send notices to women to appear to be examined for jury duty, then it is not, as respondent states, a "useless irritation." Rather, it is the very kind of irritation that is necessary to uphold the American tradition of trial by jury. *Ballard* v. *United States*, 67 Sup. Ct. 261, *Zap* v. *United States*, October Term, 1945, No. 489, decided March 3, 1947.[5]

The exclusion of women from the panel intensified and made more effective the discrimination against labor on the panel. For with the exclusion of women, the wives and daughters of laboring men were excluded, and there was accordingly no representation directly or indirectly of the laboring classes on the jury panel (compare *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 222).

E

The case of *Rawlins* v. *Georgia*, 201 U. S. 638, upon which respondent relies, has no bearing whatever on the present case. It was found in the *Rawlins* case that lawyers, ministers, doctors, dentists, railroad engineers, and railroad firemen were excluded from jury service, on the ground that it was for the good of the community that their work should not be interrupted. Petitioner does not argue that a jury must contain representatives of every occupation in order to satisfy the principle that the jury must be a body truly representative of the community. What petitioner does claim is that the intentional, discriminatory,

[5] Since this latter decision there can be no doubt that a man can validly complain of being tried by a jury from which women are excluded.

and irrational exclusion of laborers, operatives, service employees, craftsmen, and foremen, some 58% of the male working population of New York County, and women, was in flagrant disregard of that principle and requires reversal of the judgment appealed from.

F

As pointed out at length in petitioner's main brief (pp. 26-29), the special jury panel differs radically from the general jury panel in New York County in that laborers, operatives, service employees, craftsmen and foremen are not excluded from the general jury as they are from the special jury; in that the discrimination against women is intensified in selecting special jurors as distinguished from general jurors; in that special juries are much more prone to convict defendants in criminal cases than are general juries.

Petitioner accordingly asserts that in being forced to go to trial before the special jury he was denied the equal protection of the laws since there is no justification whatever for empanelling the special jury as distinguished from the general jury.

As petitioner pointed out (main brief, pp. 29-33), all the qualifications for special jury duty are also necessary qualifications for general jury duty. The officials of the Division of Jurors testified that intelligence was the important qualification for special jury duty, and intelligence is by statute a necessary qualification for a general juror.

Respondent lists (brief, pp. 3-4) certain statutory disqualifications for special jury duty which it claims justified the trial of petitioner before a special jury as distinguished from a general jury. Since each of these disqualifications for special jury duty is also a disqualification for general jury duty, respondent's claim is specious.

Each prospective juror in New York County answers one and the same questionnaire, regardless of whether he ultimately becomes a general or special juror. This question-

naire includes questions designed to test the eligibility of the juror for special jury duty. However, since these questions are also fundamental to eligibility for duty on any jury, they are applicable to all prospective jurors alike.

While the statute (*Judiciary Law*, § 749-aa, subsection 2, see petitioner's main brief, Appendix A, pp. 1-2), sets forth some ten disqualifications for special jury duty, the head of the Division of Jurors testified that only two of these had any particular bearing on eligibility for special jury duty (R. 46).

One of these disqualifications appears as the second part of Question No. 26 on the questionnaire (Defendant's Exhibit D-1, R. 508A): "Have you such views concerning the death penalty as would prevent you from finding a defendant guilty if the crime charged be punishable by death?"

A prospective juror who answers this question in the affirmative cannot be accepted as a special juror, and at one time it could be contended that a possible saving of time resulted in murder cases tried by a special jury. However, with the amending of the *Judiciary Law* of the State of New York in 1940, this possible justification for the special jury system disappeared completely. As the Judicial Council of the State of New York stated in its *Eighth Annual Report* (see petitioner's main brief, Appendix D, pp. 49-50), concurrent with its continued recommendation that special juries be abolished:

> "It has been said that the abolition of special juries will result in too great a loss of time at the trial of actions where the crime charged is punishable by death, by reason of the possible drawing of jurors opposed to capital punishment. This matter, however, has been taken into account under the revised jury system in section 597 of the Judiciary Law which reads as follows:
>
> "'par. 597. Jurors with scruples against death penalty. No person shall be selected as a grand juror or as a trial juror in a criminal action where the crime charged is or may be punishable by death, who has

stated to the county clerk in his examination under oath as required, that he has conscientious scruples against the death penalty and that such scruples would prevent him from returning an indictment, or returning a verdict of guilty, of murder in the first degree. Such scruples shall not, however, hinder the selection of such person to serve as a trial juror in any civil action or in any criminal action other than that specified above.' (Added L. 1940, ch. 202, effective Sept. 1, 1940).

"This section applies to all trial and grand jurors throughout New York City and was included specifically to save time in the examination of jurors by attorneys. It has proven successful in Richmond County, which has no special jurors."

It is accordingly certain that there is nothing in the disqualification covered by the second part of Question No. 20 on the questionnaire to justify the insidious and discriminatory special jury system.

The only other statutory disqualification for special jury duty which the head of the Division of Jurors stated (R. 46) was of any particular pertinence in selecting special jurors, was the disqualification covered by the second part of Question No. 21 on the questionnaire (Defendant's Exhibit D-1, R. 508 A): "Do you doubt your inability to lay aside opinions or impressions, the result of newspaper reading or hearsay, and render an impartial verdict upon the evidence?"

The head of the Division of Jurors testified (R. 56): "Of course, if there are glaring errors in the questionnaire, he (the prospective juror) is not accepted at all as a juror to serve anywhere". It is obvious that "inability to lay aside opinions or impressions, the result of newspaper reading or hearsay, and render an impartial verdict upon the evidence" is the very kind of "glaring error" which the head of the Division of Jurors testified would disqualify

one from any kind of jury duty. If not, then it is certain that it should be.[6]

G

The case of *Hall* v. *Johnson*, 186 U. S. 480, cited in the addendum to respondent's brief, did not decide any question before the Court in the present case. Hall claimed

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[6] The questionable value of such a general question as the second part of Question No. 21 is demonstrated by the fact that 21 of the talesmen examined on the *voir dire* in this case, who presumably had answered the second part of this question in the negative in order to qualify for the special jury panel, were excused because of their admitted inability to lay aside opinions concerning the present case, the result of newspaper reading or hearsay, and to render an impartial verdict upon the evidence in this case. The following talesmen testified that they had opinions unfavorable to labor or the representatives of labor which they could not lay aside: Howard Berusch, manufacturer (R. 230-231); Bertram A. Mayer, manufacturer (R. 300-302); John W. Weber, Jr., vice-president of manufacturing corporation (R. 261-262); Newbury F. Read, real estate broker (R. 213-214); Henry L. Goetz, wholesale jeweler (R. 211-213); James E. Morrow, industrial promoter and financier (R. 333-335); Richard S. Brautigam, sales promotion and advertising man with the American Can Company (R. 138, 143-144); Murrill W. Reddick, salesman (R. 286-288). The following talesmen testified that they could not lay aside opinions unfavorable to petitioner gained from reading articles written by Westbrook Pegler: Allen B. Kendrick, stock broker (R. 247-249); Norman S. McMillian, stock broker (R. 305-306); Lawrence L. Oppenheimer, sales supervisor for Philip Morris & Company (R. 273-275); Charles A. Livingston, advertising business (R. 277, 281); Phil A. Alexander (R. 252); see also, Guy R. Jenkins, insurance broker (R. 235, 238, 239). The following talesmen testified that they could not lay aside opinions concerning the case gained from reading about it: Robert B. Brown, assistant vice-president Bristol Myers Company (R. 294-295); James M. Geraghty, art editor, New Yorker Magazine (R. 326-327). The following testified that they had opinions concerning the case which might prejudice one side or the other: Victor H. Scales, public relations counsel (R. 304); Charles E. Seitman, salesman (R. 318, 319); Bertrand P. English, sales and merchandise manager (R. 327-328); Mildred Simon, with ladies' accessory company (R. 341); John W. Witherington (R. 342); Augustus E. Lewis testified that he had definite views about labor which he could not set aside (R. 335). See also Guy R. Jenkins, insurance broker (R. 235, 238, 239).

that by virtue of being tried by a special jury he was treated differently than defendants in some other criminal cases. But that was all he claimed; and it is fundamental that a mere claim of different treatment raises no constitutional question, and that the Legislature may treat various groups and classes of people differently unless it is shown that there is no rational justification for the different treatment. The present petitioner has claimed and shown, as the petitioner in the *Hall* case did not, that there is no justification for the empanelling of a special jury as distinguished from a general jury, and that his trial before the special jury was unwarranted, discriminatory, prejudicial, and a denial of the equal protection of the laws.

A second substantial difference between the *Hall* case and the present case is the fact that the relationship between the general and special jury systems at the time of the *Hall* case was radically different than the relationship of the two systems at the time of petitioner's trial. Petitioner has shown that there is no justification for the special jury system since the qualifications for general and special jury duty are now substantially the same. But it could not be said that the qualifications were substantially the same at the time of Hall's trial.[7] For example, to qualify for special jury duty at the time of Hall's trial, one had to have been a citizen of the United States for at least ten years. To qualify for general jury duty the length of citizenship was immaterial. To qualify for special jury duty, one had to be at least thirty years of age; to qualify for general jury duty, one had to be only twenty-one years of age or more. To qualify for special jury duty, one could have no scruples against the imposition of the death penalty; there was no such disqualification from general jury duty. To qualify for special jury duty, one had to show that he had not been convicted of a criminal offense;

[7] Compare Laws of 1896, ch. 378, the law then relating to special jurors, with Section 1079 of the New York Code of Civil Procedure, the law then relating to general jurors.

this was not a qualification *for general jury duty*. To qualify for special jury duty, one had to have "approved integrity" and "sound judgment"; these virtues were not qualifications for general jury duty. These differences in the qualifications of special and general jurors at the time of Hall's trial *have since been abolished*. As the Judicial Council of the State of New York has pointed out (see petitioner's main brief, p. 31), the method of jury selection now in effect "applies to *all* jurors those high standards which were formerly required only of special jurors".

Finally, it seems clear that this Court did nothing more in the *Hall* case than to decide that the remedy sought to be invoked, habeas corpus, was improper, and that petitioner should have proceeded by writ of error. All but one case cited in the Court's *per curiam* opinion is to that effect, and the case of *Brown* v. *New Jersey*, 175 U. S. 172 (*supra*, p. 5), is not responsive to any claim of denial of the equal protection of the laws.

CONCLUSION

The judgment appealed from should be reversed.

Respectfully submitted,

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